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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 431

FREDERICK C. HICKS, ALIEN PROPERTY CUSTODIAN,
AND FRANK WHITE, TREASURER OF THE UNITED
STATES, APPELLANTS

VS.

THE EQUITABLE TRUST COMPANY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA

FILED MAY 2, 1926

(31139)

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Supreme Court of the District of Columbia

THE EQUITABLE TRUST COMPANY OF NEW YORK,
plaintiff*vs.*THOMAS WOODNUT MILLER, ALIEN PROPERTY CUS-
todian, and Frank White, Treasurer of the
United States, defendants

Equity No. 42270

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill of complaint

Filed February 25, 1924

Supreme Court of the District of Columbia

Holding an Equity Court

THE EQUITABLE TRUST COMPANY OF NEW YORK,
plaintiff*vs.*THOMAS WOODNUT MILLER, ALIEN PROPERTY CUS-
todian, and Frank White, Treasurer of the
United States, defendants

Equity No. 42270

To the Supreme Court of the District of Columbia:

Plaintiff states as follows:

I. At all times hereinafter mentioned, plaintiff, the Equitable Trust Company of New York, was and now is a corporation organized and existing under the laws of the State of New York, having a place of business at No. 37 Wall Street, in the Borough of Manhattan, city, county, and State of New York, and brings this suit in its own right because of and for the matters and things hereinafter set forth.

II. Defendant, Thomas Woodnutt Miller, by appointment of the President of the United States of America, under authority and provisions of section 6 of the act of Congress approved October 6, 1917 (40 Stats. L. 411, 415), entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," and known as the "trading with the enemy act," is now and since the 12th day of March, 1921, in succession to one Francis P. Garvan has been Alien Property Custodian, duly empowered by law to receive and to hold, administer, and account under the general direction of the President and as provided in said "trading with the enemy act" for all money and property in the United States" due or belonging to an enemy or ally of enemy which may be paid, conveyed, transferred, assigned, or delivered to said (Alien Property)

Custodian under the provisions of" said act, and is sued herein as such Alien Property Custodian.

III. By section 12 of the "trading with the enemy act" (40 Stats. L. 411, 423) it is provided and required "that all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this ('trading with the enemy) act' shall be deposited forthwith in the Treasury of the United States."

Defendant, Frank White, is Treasurer of the United States and is sued herein as such Treasurer, for and because of the matters and things hereinafter set forth.

IV. Prior to the 24th day of January 1916—that is, from and after the 24th day of December, 1915—there was existent and in full force as published in the Reichsgesetzblatt (Code of the Empire) for 1915, at page 842 thereof, a certain law of the Imperial German Empire entitled (as translated) an "Act relating to the establishment of the second amendment to the budget of the Empire for the year 1915, dated December 24, 1915," which said law, omitting said title, is in the words and figures following, to wit:

"We, Wilhelm, by the grace of God, the German Emperor, King of Prussia, etc., order in the name of the Empire, the Federal Council and the Reichstag having consented, as follows:

" Paragraph 1

"The second amendment of the budget of the Empire for the year 1915, annexed hereto, shall be added to the budget.

" Paragraph 2

3 "The Imperial Chancellor shall be permitted to float a loan in the sum of 10,000,000,000 marks in order to meet extraordinary expenditures which only once take place.

" Paragraph 3

"The bonds and treasury notes and coupons thereto belonging which shall be issued may wholly or partly be made payable in foreign currency or in domestic and foreign currency at a certain rate of exchange to be fixed and may be made payable in a foreign country.

"It shall be left to the discretion of the Imperial Chancellor to fix such rate of exchange and special conditions for payments in a foreign country.

"Certified by our own signature and the imperial seal affixed hereto.

[L. S.]

WILHELM.

"Done General Headquarters,
December 24, 1915.

"VON BETHMANN HOLLWEG."

V. Pursuant to the authority and provisions of said law, the Government of the German Empire prior to the first day of June, 1916—that is, on or about the 24th day of January, 1916—issued

treasury notes of the German Empire, identified as series 26, Lit X, Nr. 191, payable in the city of New York, State of New York, in dollars in gold coin of the United States of America. Each of such treasury notes, except for appropriate variations in serial numbers and amounts, reads as follows:

"Due on the first day of April, 1917, Series 26, Lit X, Nr. 191.

"TREASURY NOTES OF THE GERMAN EMPIRE

"part of a total amount of 10,000,000 dollars issued under authority of the law of December 24, 1915. (Code of the Empire of 1915, p. 842.)

"The holder of this note is entitled to receive payment on April 1st, 1917, of the amount of

"10,000 Dollars

"TEN THOUSAND DOLLARS

"in gold coin of the United States of America, at the office of the Central Trust Company of New York, New York.

"This note is exempt from all present and future German taxes and duties.

"The time for payment of this note after maturity is limited by prescription to April 1st, 1947.

"This note is valid only if legalized by the signature of the Imperial German Ambassador at Washington, or by the signature of his authorized representative, under the embassy's official seal.

"REICHSSCHULDENVERWALTUNG. (German script.)

"BERLIN, January 24, 1916."

"WASHINGTON, May 24, 1916,

"GERMAN EMBASSY.

"Registered.

"Kgl. Preuss. Knotrolle der Staatspapiere Haar.

[EMBASSY SEAL.]

"J. V. BERNSTORFF.

"Issued.

"BAUN."

VI. On or about the 1st day of June, 1916, plaintiff, the Equitable Trust Company, of New York, purchased for value and still holds unpaid certain of the treasury notes above referred to and described, same being more particularly identified as to number and principal amounts represented thereby as follows:

Notes numbered 15 to 19, both included, for the principal sum of \$50,000 each, aggregating-----	\$250,000
Notes numbered 59 to 62, both included, and 65 and 68, for the principal sum of \$25,000 each, aggregating-----	150,000
Notes numbered 184 to 193, both included, for the principal sum of \$10,000 each, aggregating-----	100,000

Each of said treasury notes of the Imperial German Empire so purchased and yet held because unpaid by this plaintiff bears the following indorsement, to wit:

"In consideration of the payment to the undersigned holder of this note of \$600, interest at the rate of six per cent per annum

from April 1, 1917, to April 1, 1918, the receipt whereof is hereby
acknowledged, the payment and maturity of this note is
5 hereby extended to April 1, 1918.

"THE EQUITABLE TRUST COMPANY OF NEW YORK.
"F. W. FULLE, *Vice President*."

Since said 1st day of June, 1916, plaintiff has been and now is the owner and holder for value in its own right of the treasury notes of the German Empire in this paragraph specified.

Interest upon said principal sum of \$500,000, at the rate of six (6) per centum per annum, has been fully paid for a period of 194 days, from April 1st, 1918—that is to say, up to the 12th day of October, 1918—as is evidenced by appropriate indorsement on the back of each of the above-described treasury notes, leaving, as of said 12th day of October, 1918, a balance due to this plaintiff on accounts of said treasury notes of \$500,000, with interest thereon from said 12th day of October, 1918, at the rate of six per centum per annum until paid.

VII. On information and belief, plaintiff avers that by virtue of his authority under the provisions of the trading with the enemy act and the Executive orders of the President of the United States pursuant thereto, the defendant, Thomas Woodnutt Miller as Alien Property Custodian or the predecessor or predecessors of said defendant as Alien Property Custodian have caused to be paid, conveyed, transferred, assigned, or delivered to themselves respectively as Alien Property Custodian certain funds, securities, and/or other property of the Government of the Imperial German Empire in this country, and that such funds, securities, and other property are
now held by the defendant, Thomas Woodnutt Miller, as
6 Alien Property Custodian, or are now held subject to his order or are now held by the defendant Frank White as Treasurer of the United States.

On information and belief plaintiff avers that the existing Government of Germany, which is the successor in interest and estate of the Imperial German Government, has admitted its indebtedness to the plaintiff upon the treasury notes of the German Empire hereinabove referred to, both principal and past due interest, and has consented in writing to the payment of the principal and interest of said indebtedness out of the funds, securities, or other property available for such purposes now in the possession or under the control of defendant Thomas Woodnutt Miller as Alien Property Custodian or in the possession or under the control of defendant Frank White as Treasurer of the United States, as the case may be.

VIII. On or about the 20th day of January, 1922, the equitable Trust Company of New York, as required in and by section 9 of said "trading with the enemy act," did file with the Alien Property Custodian a notice of its claim under oath for and on account of said treasury notes so as aforesaid unpaid and held by it together with interest at six (6) per centum per annum accrued and to accrue due thereon, all in such form and containing such particulars as said custodian then required, and thereafter plaintiff did make application to the President of the United States to order the payment and delivery to it of so much of said moneys so transferred, assigned, delivered, and paid to said custodian as was necessary to pay and discharge its said claim, but this the President on or about the 5th

7 day of March, 1923, exercising the discretion in him reposed by said "trading with the enemy act," declined to do, thus relegating this plaintiff to its suit in equity as in and by said "trading with the enemy act" is provided.

IX. Plaintiff, the Equitable Trust Company of New York, is not now nor at any time has been an enemy or ally of any enemy within the definitions and meanings of "the trading with the enemy act." It claims an interest and right in the aforesaid funds, securities, and other property in the possession or under the control of Thomas Woodnutt Miller as Alien Property Custodian or in the possession or under the control of defendant Frank White as Treasurer of the United States as aforesaid, and brings this, its suit, as authorized so to do under the provisions of section 9 (a) of said "trading with the enemy act" as amended by the act of Congress approved March 4, 1923 (Public No. 536, 67th Congress), to establish its interest, right, and debt as hereinbefore set forth and claimed.

Wherefore plaintiff respectfully prays:

1. That writs of subpoena may be issued against said defendants,
 - (a) Thomas Woodnutt Miller, Alien Property Custodian (office address, Arlington Building, Vermont Avenue and H Street Northwest; residence, the Racquet Club, No. 1135 Sixteenth Street Northwest), and
 - (b) Frank White, Treasurer of the United States (office address, Treasury Department Building; residence, No. 5200 Thirteenth Street Northwest),

commanding them and each of them to answer the exigencies of this bill of complaint.

2. Upon proof made and after hearing that defendant
8 Thomas Woodnutt Miller as Alien Property Custodian and defendant Frank White as Treasurer of the United States, and both or either of them as the case may require and this honorable court shall determine to be just and proper, shall pay over to the plaintiff out of any funds of the Government of the German Empire now in their custody or in the custody of either of them the sum of \$500,000 with interest upon said sum from the 12th day of October, 1918, at the rate of six per cent per annum to the date of this decree, and thereafter to the date of payment if this honorable court should so adjudge; or that any securities or other property of the Government of the German Empire in the custody of the defendant Thomas Woodnutt Miller as Alien Property Custodian be sold by him under order of this court, and that the said sum of \$500,000 with interest as aforesaid, or any balance thereof which may remain unpaid after the aforesaid payments shall have been made, be paid to the plaintiff out of the proceeds of such sale.

3. For such other and further relief as this honorable court, the premises considered, may deem just and proper.

And plaintiff will ever pray, etc., etc.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

By A. W. LOASBY, *President*.

MURRAY, ALDRICH & ROBERTS,

37 Wall Street, New York.

McKENNEY & FLANNERY,

Hibbs Building, Washington, D. C.,

Attorneys for Plaintiff.

9 STATE OF NEW YORK,

County of New York, Southern District of New York, ss:

Arthur W. Loasby, being first duly sworn, deposes and says:

That he is an officer, to wit, the President of the Equitable Trust Company of New York, the plaintiff in this action; that he has read the foregoing bill of complaint and knows the contents thereof, and that the facts therein stated of his own knowledge are true, and that as to the facts therein stated and alleged on information and belief, he is credibly informed and verily believes the same to be true.

ARTHUR W. LOASBY.

Sworn to before me and signed in my presence this 19th day of February, 1924.

[SEAL.]

JOHN A. HALE,

Notary Public, Kings County, No. 215, Reg. No. 4221.

Certificate filed in N. Y. Co., No. 52, Reg. No. 4418. Commission expires March 30th, 1924.

10

Spa to ans.

Issued February 25, 1924

* * * * *

The President of the United States to—

(1) Thomas W. Miller, Alien Property Custodian,

(2) Frank White, Treasurer of the U. S., defendants.

You are hereby commanded to appear in this court on or before the tenth day, exclusive of Sundays and legal holidays, after the day of the service of this subpoena upon you and answer the exigency of the bill under pain of attachment and such other process of contempt as the court shall award; and if your appearance in this suit be not entered in the clerk's office within said time the bill may be taken for confessed.

Witness the Honorable Walter I. McCoy, chief justice of said court, the 25 day of February, A. D. 1924.

[SEAL.]

MORGAN H. BEACH, *Clerk,*By F. S. ROHRER, *Assistant Clerk.*McKENNY & FLANNERY, *Attorneys.*

Marshal's return

Served copy of within summons, bill of complaint, and interrogatories on defendant Thomas W. Miller, Alien Property Custodian, by personal service on W. W. Wilson, Assistant and Acting Alien Property Custodian, February 25, 1923; also served summons, bill of complaint, and interrogatories on Frank White, Treasurer of U. S., personally, February 25, 1924.

E. C. SNYDER, *U. S. Marshal*
W. J. K.

Filed Feb. 27, 1924.

11

Motion to dismiss

Filed March 11, 1924

Now come the defendants, Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States, by their attorney, Peyton Gordon, Esquire, attorney of the United States in and for the District of Columbia, separately and severally moving to dismiss the bill of complaint, and as grounds for their separate and several motions assign the following:

(1) It appears affirmatively from the allegations of the bill of complaint that the Imperial German Government, and/or its successor or successors, has an interest in the subject matter of this suit and has not been made a party thereto.

(2) It does not appear from the allegations of the bill of complaint that the Imperial German Government, and/or its successor or successors, has consented that this court shall have jurisdiction to adjudicate with respect to claims against the said Government, or to subject its property to the payment of claims against it.

(3) That the bill of complaint does not state grounds for equitable relief against these defendants within the jurisdiction of this court.

(4) The plaintiff has not stated facts sufficient to entitle it to equitable relief under the provisions of section 9 of the trading with the enemy act.

(5) That pursuant to the terms and provisions of the trading with the enemy act, the amendments thereto, and the treaty between the United States of America and Germany, signed August 25, 1921, and effective at the time of filing of the bill of complaint herein, the United States of America became and ever since said time was and now is the owner of the moneys which plaintiff seeks in this suit to subject to the payment of her claim.

PEYTON GORDON,

Attorney of the United States in and for the District of Columbia, Attorney for Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States.

Order denying motion to dismiss

Filed March 21, 1924

This cause having come on to be heard upon the motion to dismiss the bill of complaint heretofore filed herein by the defendants, Thomas Woodnutt Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, and same having been argued by counsel, it is this 21st day of March, A. D., 1924, adjudged and ordered that the said motion to dismiss be, and the same is hereby, denied.

WENDELL P. STAFFORD, *Justice.*

Answer to bill of complaint

Filed April 24, 1924

* * * * *

Now come the defendants, Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States, separately and severally answering the bill of complaint, and for their separate and several answers say:

13 (1) They admit the averments of paragraph numbered I of the bill of complaint;

(2) They admit the averments of paragraph numbered II of the bill of complaint;

(3) They admit the averments of paragraph numbered III of the bill of complaint;

(4) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered IV of the bill of complaint, and therefore demand strict proof thereof;

(5) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered V of the bill of complaint, and therefore demand strict proof thereof;

(6) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered VI of the bill of complaint, and therefore demand strict proof thereof;

(7) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered VII of the bill of complaint and therefore demand strict proof thereof;

(8) They admit the averments of paragraph numbered VIII of the bill of complaint;

(9) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered IX of the bill of complaint, and therefore demand strict proof thereof;

Wherefore, having fully answered the bill of complaint, these defendants pray that they be dismissed with their costs in this behalf expended, and for such other and further relief to which in

14 the premises they may be justly entitled.

THOMAS W. MILLER,

Alien Property Custodian.

FRANK WHITE,

Treasurer of the United States.

PEYTON GORDON,

Attorney of the United States in and for the District of Columbia.

DISTRICT OF COLUMBIA, ss:

Thomas W. Miller, being first duly sworn, upon oath deposes and says that he is Alien Property Custodian of the United States of America; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein

stated as of his personal knowledge are true, and those stated as upon information and belief he believes to be true.

THOMAS W. MILLER.

Subscribed and sworn to before me this 31st day of March, 1924.

[SEAL.]

SOPHIE D. HILLMAN,

Notary Public, D. C.

DISTRICT OF COLUMBIA, ss.:

Frank White, being first duly sworn, upon oath deposes and says that he is Treasurer of the United States of America; that he has read the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein stated as of his personal knowledge are true, and those stated as upon information and belief he believes to be true.

FRANK WHITE.

15 Subscribed and sworn to before me this day of March, 1924.

[SEAL.]

T. T. ELLIS,

Notary Public, D. C.

Stipulation inter parties

Filed June 14, 1924

It is hereby stipulated:

1. That the purported English translation of the Law of the Imperial German Empire of date of 24th day of December, 1915, which appears in paragraph 4 of plaintiff's bill of complaint, is a correct and appropriate translation of the German text of said law as the same appears and remains published in the "Reichsgesetzblatt" for 1915 at page 842 et seq. thereof.

2. That plaintiff, the Equitable Trust Company of New York, is the holder of genuine treasury notes of the Imperial German Empire dated Berlin, January 24, 1916, issued in pursuance of the authority and provisions of the law of the 24th day of December, 1915, in said bill of complaint set forth, each bearing the signature of the sometime imperial German ambassador at Washington, J. v. Bernstorff, and an impress of the official seal of said embassy, each of said notes being of Series 26, Lit. X., Nr. 19, and more specifically identified as follows:

Notes numbered 15, 16, 17, 18, and 19 for the principal sum of \$50,- 000 each	\$250, 000
Notes numbered 59, 60, 61, 62, 65, and 68 for the principal sum of \$25,000 each	150, 000
16 Notes numbered 184, 185, 186, 187, 188, 189, 190, 191, 192, and 193, for the principal sum of \$10,000 each	100, 000
	500, 000

Each and every of said notes above described and identified is indorsed as follows:

"In consideration of the payment to the undersigned holder of this note of \$600, interest at the rate of six per cent per annum, from

April 1, 1917, to April 1, 1918, the receipt whereof is hereby acknowledged, the payment and maturity of this note is hereby extended to April 1, 1918.

(Signed)

"EQUITABLE TRUST COMPANY OF NEW YORK,
"F. FULLE, *Vice President.*

EQUITABLE TRUST COMPANY OF NEW YORK,
By McKENNEY & FLANNERY,
Its Attorneys of Record.

THOMAS WOODNUTT MILLER,
Alien Property Custodian.

FRANK WHITE,
Treasurer of the United States.

By PEYTON GORDON,
Their Attorney of Record.

MAY 20, 1924.

O. K.

D. H. S.

Final decree

Filed June 19, 1924

* * * * *

This cause having come on to be heard on the pleadings and the evidence introduced by the respective parties in support thereof, and the same having been fully considered by the court, it is this 19th day of June A. D., 1924, adjudged, ordered, and decreed:

1. The plaintiff, the Equitable Trust Company of New York, is not now, and never has been, an enemy or ally of enemy within the purview of the act of Congress, approved October 6, 1917, entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," and amendments thereof.

2. Prior to October 6, 1917, the Imperial German Government was an enemy within the purview of said "trading with the enemy act" and was indebted to the plaintiff in the sum of five hundred thousand dollars (\$500,000), with interest thereon, all as evidenced by Imperial German Government treasury notes identified and described as follows:

(a) Issue of June 1, 1916, Series 26, Lit. X, Nr. 191, numbered 15 to 19, both included, for the principal sum of \$50,000 each, aggregating \$250,000.

(b) Issue of June 1, 1916, Series 26, Lit. X, Nr. 191, numbered 59 to 62, both included, and 65 and 68, for the principal sum of \$25,000 each, aggregating \$150,000.

(c) Issue of June 1, 1916, Series 26, Lit. X, Nr. 191, numbered 184 to 193, both included, for the principal sum of \$10,000 each, aggregating \$100,000.

3. Plaintiff has duly established its said debt and is entitled to be paid the sum of five hundred thousand dollars (\$500,000), with interest at the rate of 6% from the 14th day of July, 1919, out of funds aggregating two million seven hundred and fifteen thousand five hundred and seventy-one dollars (\$2,715,571), hereby decreed to be funds formerly belonging to said Imperial German

Government, heretofore seized by defendant, Thomas W. Miller, Alien Property Custodian, and held by defendant, Frank White, Treasurer of the United States, to the credit of accounts standing on the books of his office identified as trust account 555 and trust account 555 special.

18 4. Upon presentation and surrender to him of said Imperial German Government treasury notes, said defendant, Frank White, Treasurer of the United States, shall forthwith pay to said plaintiff, the Equitable Trust Company of New York, and/or its duly authorized representative, the said sum of five hundred thousand dollars (\$500,000), with interest at the rate of six (6) per centum per annum thereon from July 14, 1919, until paid.

WENDELL P. STAFFORD, *Justice*.

From the foregoing decree Thomas W. Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, note an appeal in open court to the Court of Appeals of the District of Columbia.

WENDELL P. STAFFORD, *Justice*.

I have no objection as to form.

DEAN HILL STANLEY.

Stipulation as to statement of evidence

Filed June 26, 1924

* * * * *

It is hereby stipulated and agreed by and between counsel for the plaintiff in the above-entitled cause and counsel for the defendants that the statement of evidence upon appeal in the case of Securities Corporation General against Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States, Equity No. 41153, is to be used as a statement of the evidence upon appeal in this case, and that reference may be made to the statement of evidence in the said case for all purposes of the appeal in this case.

19

McKENNEY & FLANNERY,
Attorneys for the Plaintiff.

PEYTON GORDON,

Attorney of the United States in and for the District of Columbia.

Attorney for Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States.

Assignment of errors

Filed June 26, 1924

Now come the defendants, Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States, and file the following assignment of errors upon which they will rely

upon their appeal from the order and decree made by this honorable court on the 19th day of June, 1924, in the above-entitled cause:

First. That the court erred in overruling motion to dismiss filed on behalf of the defendants.

Second. That the court erred in not sustaining the motion to dismiss filed on behalf of the defendants.

Third. That the court erred in not ordering, adjudging, and decreeing that the bill of complaint be dismissed.

Fourth. That the court erred in adjudging and holding that the Imperial German Government, or its successor or successors, is not a necessary party to the suit.

Fifth. That the court erred in ordering, adjudging, and decreeing that the plaintiff has established a debt and is entitled to be
20 paid the sum of \$500,000 and interest at the rate of 6% per annum from July 14, 1919, out of funds aggregating \$2,715,571, belonging to the Imperial German Government, and seized by the defendant Thomas W. Miller as Alien Property Custodian and in the possession of the defendant Frank White as Treasurer of the United States, in trusts numbered 555 and 555 special.

Sixth. That the court erred in ordering, adjudging, and decreeing that there was in the possession of the defendant Frank White as Treasurer of the United States \$2,715,571 belonging to the Imperial German Government.

Seventh. That the court erred in ordering, adjudging, and decreeing that the defendant Thomas W. Miller as Alien Property Custodian seized the sum of \$2,715,571 belonging to the Imperial German Government.

Eighth. That the court erred in not ordering, adjudging and decreeing that there was not in the possession either of Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States, or either of them, any sum of money which at the time of the receipt thereof by either the custodian or the Treasurer was the money of the Imperial German Government.

Ninth. That the court erred in not ordering, adjudging, and decreeing that there was no evidence in the case to show there was in the possession either of Thomas W. Miller as Alien Property Custodian or Frank White as Treasurer of the United States any money belonging to the Imperial German Government, or its successor or successors.

Tenth. The court erred in admitting into evidence over the objection and exception of the defendants certain portions of the answer filed on behalf of these defendants in the case of Mechanics Securities Corporation against Thomas W. Miller as Alien Prop-
21 erty Custodian and Frank White as Treasurer of the United States, Equity No. 41284, which is in words and figures as follows:

Now come the defendants, Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States, separately and severally answering the bill of complaint and as their separate and several answers say:

(1-2) These defendants admit the averments of paragraphs numbered 1 and 2 of the bill of complaint.

(3) That the allegations of paragraph numbered 3 of the bill of complaint are immaterial and irrelevant for the purposes of

his suit, and these defendants should not be required to answer the same.

(4-5) They admit the averments of paragraphs numbered 4 and 5 of the bill of complaint.

(6) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraphs numbered 6 of the bill of complaint, and therefore demand strict proof thereof.

Further answering the said paragraph, these defendants separately and severally say that on or about the 13th day of February, 1920, Chandler & Company, Inc., as trustee, filed its notice of claim pursuant to the terms and provisions of section 9 of the trading with the enemy act for ninety-six thousand five hundred eighty dollars and fifty-five cents (\$96,580.55), which had theretofore been delivered to the Alien Property Custodian by the said Chandler & Company, Inc., as the money of the Imperial German Government. On the same date the said Chandler & Company, Inc., duly filed its application to the President for the allowance of the said claim under section 9 of the trading with the enemy act. The said claim of Chandler & Company, Inc., was based upon the fact that the said ninety-six thousand five hundred eighty dollars and fifty-five cents (\$96,580.55) had been deposited with the claimant prior to October 6, 1917, for the payment of interest on notes of the Imperial German Government. Thereafter the said claim was allowed by the Attorney General of the United States, to whom the President had by Executive order delegated his authority under the terms and provisions of the trading with the enemy act, for the reason that as found by the Attorney General the aforesaid money had been paid over unqualifiedly to Chandler & Co., Inc., by the German Government for the purpose aforesaid, and was held by Chandler & Co., Inc., not for the German Government but as trustee for the holders and owners of the said notes, and upon the further finding by the Attorney General that the said money belonged to citizens of the United States both in the capacity of trustee and as cestui que trust, and the Treasurer of the United States was ordered to pay to Chandler & Co., Inc., the sum of \$96,580.55 out of the money held in the Treasury of the United States pursuant to the trading with the enemy act, in trust No. 555 as the property of the Imperial German Government. Thereafter the said claim was duly paid by the Treasurer of the United States, not in recognition of the validity of the claim of the plaintiff or of any other person as set forth in the bill of complaint, but upon the order of the Attorney General of the United States based upon his aforesaid findings.

(7) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph 7 of the bill of complaint, and therefore demand strict proof thereof.

(8) Answering the averments of paragraph numbered 8 of the bill of complaint, these defendants separately and severally say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of the trading with the enemy act, the amendments thereto, and the proclamations and Executive orders issued thereunder, after investigation determined that the Imperial German Government was an enemy within the purview and mean-

ing of the said act, the amendments thereto, and the proclamations and Executive orders issued thereunder, and that certain moneys were owing or belonging to, held for, by, on account of, and for the benefit of the said enemy. Thereupon the Alien Property Custodian required the said moneys and other property to be conveyed, transferred, assigned, delivered, and/or paid to him, to be by him held, administered, and accounted for as provided by law. Thereafter the demands of the Alien Property Custodian were fulfilled, and he received certain moneys pursuant to the said demand and paid the same to the Treasurer of the United States in accordance with the provisions of the trading with the enemy act. The amount of said moneys received as aforesaid is at the present time approximately five hundred fifteen thousand five hundred seventy-one dollars (\$515,571) and is held by the Alien Property Custodian in Trust No. 555.

Further answering said paragraph, these defendants separately and severally say that the Alien Property Custodian, acting under and pursuant to the terms and provisions of the trading with the enemy act, the amendments thereto, and the proclamations and

Executive orders issued thereunder, after investigation determined that certain money was by Lee, Higginson & Company, 24 of Boston, Massachusetts, in the approximate amount of five million dollars (\$5,000,000) held for, by, on account of, and for the benefit of an unknown enemy. Thereupon the Alien Property Custodian required the said money to be paid to him. Thereafter the demand of the Alien Property Custodian was fulfilled, and he received, as aforesaid, the said sum of five million dollars (\$5,000,000), which he paid to the Treasurer of the United States in accordance with the terms and provisions of the trading with the enemy act, and the said money was thereupon placed to the credit of unknown enemy No. 1, in trust No. 9322. Thereafter, and to wit, on or about the 8th day of March, 1923, the Alien Property Custodian determined that two million two hundred thousand dollars (\$2,200,000) of the five million dollars (\$5,000,000) received as aforesaid was at the time of the receipt thereof by the Alien Property Custodian held for, by, on account of, and for the benefit of the Imperial German Government. Thereupon the Alien Property Custodian directed the Treasurer of the United States to transfer from trust No. 9322 the sum of two million two hundred thousand dollars (\$2,200,000) and to place the same to the credit of the Imperial German Government, opening a special account designated "Trust 555—Special." Thereafter the Treasurer of the United States, pursuant to the said instructions, so transferred the said two million two hundred thousand dollars (\$2,200,000) to said trust.

Further answering said paragraph, these defendants say that they have no further knowledge, information, or belief with respect to the ownership of any of the said money received as aforesaid 25 by the Alien Property Custodian, and this court must determine out of what, if any, of the money held by the Alien Property Custodian, and/or the Treasurer of the United States, any claim which these defendants may establish must be paid.

(9) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered 9 of the bill of complaint, and therefore demand strict proof thereof.

(10) They admit the averments of paragraph numbered 10 of the bill of complaint.

Eleventh. The court erred in admitting into evidence over the objection and exception of the defendants, plaintiff's Exhibit 4, which is in words and figures as follows:

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
June 13, 1924.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true copies of the record entries of the Treasury in Trust No. 9322, "Undisclosed enemy #1," and Trust No. 555—Special, "Imperial German Government," showing transfer of funds from Trust No. 9322 to Trust No. 555—Special, and the letter dated March 9, 1923, authorizing such transfer in this department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]

GARRARD B. WINSTON,
Undersecretary of the Treasury.
H. H.

26 Trust #333—Special.—
Date C/D No.

(The following appears in red ink :)
(4 suits 5/11/23.) (5 suits.)
Imperial German Government.
Amount Col. Bk.
\$2,200,000.00 A. P. C. letter of 3/9/23

Trans. from Tr. #9322.—

Do not post this card.

Trust #9322. Undisclosed enemy #1.
Date C/D No.
3/29/18 1

Amount Col. Bk.
5,077,057.64 -----

NOTE.—Above amount, originally deposited by custodian in Boston F. R. B., transferred to Treasury under above date.

M.

Trans. to Tr. 555 Special
2,200,000.00 A. P. C. letter 3/9/23
\$2,877,057.64

[Copy]

ALIEN PROPERTY CUSTODIAN,
ARLINGTON BUILDING,
VERMONT AVENUE AND H STREET,
Washington, March 9, 1923.

The honorable the SECRETARY OF THE TREASURY,
Division of Bookkeeping & Warrants, Washington, D. C.

SIR: On March 29, 1918, there was established a credit of
27 \$5,077,057.64 for Special Account No. 8—account of undisclosed
enemy No. 1—Trust 9322, representing funds held by the Fed-
eral Reserve Bank of Boston.

It is now desired that you transfer on your records from Trust
9322 the sum of \$2,200,000.00 to the amount of the Imperial Ger-
man Government—Trust No. 555—Special. It is desired that this

fund of \$2,200,000.00 be not intermingled with funds already on deposit in Trust 555 and is therefore desired that you mark the new account opened as Trust No. 555—Special.

The funds to be so set aside are to be used for the Imperial German Government in connection with claim No. 386 and the claims associated therewith.

Very truly yours,

(Signed)

DIVISION OF TRUSTS.

WM. M. WHITE,

Assistant Chief.

Twelfth. The court erred in not ordering, adjudging, and decreeing that the evidence was insufficient to warrant a decree in favor of the plaintiff.

Thirteenth. The court erred in not ordering, adjudging, and decreeing that the bill of complaint be dismissed.

Fourteenth. The court erred in not dismissing the bill of complaint.

All of which is respectfully submitted.

Dated, Washington, D. C., this 26 day of June, 1924.

PEYTON GORDON,

Attorney of the United States in and for the District of Columbia, Attorney for Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States.

28 Service of a copy of the above acknowledged this 26th day of June, 1924.

McKENNEY & FLANNERY,

Attorneys for Plaintiff.

Designation of record

Filed June 26, 1924

* * * * *

To the clerk of the Supreme Court of the District of Columbia:

You will please incorporate in the transcript of the record to be prepared in the above-entitled cause on appeal to the Court of Appeals of the District of Columbia the following documents and papers:

Bill of complaint.

Subpoenas.

Motion of defendants to dismiss bill of complaint.

Order overruling motion to dismiss.

Answer of defendants.

Stipulation of facts.

Stipulation as to statement of evidence.

The statement of evidence in this case is the same as that in the case of Securities Corporation General against the same defendants, Equity No. 41153, and by stipulation reference is to be made to that statement of evidence on appeal.

Final decree.

Assignment of errors.
This designation of record.

PEYTON GORDON,
Attorney of the United States in and for the District of Columbia, Attorney for Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States.

Service of a copy of the above accepted this 26th day of June, 1924.

McKENNEY & FLANNERY,
Attorneys for Plaintiff.

29 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the forgoing pages, numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 42270 in equity, wherein the Equitable Trust Company of New York is plaintiff and Thomas Woodnutt Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3d day of September, 1924.

[SEAL.]

EW MORGAN H. BEACH, *Clerk.*

(Indorsed on cover:) District of Columbia Supreme Court. No. 4208. Thomas Woodnutt Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, Appellants, vs. The Equitable Trust Company of New York, a corporation. Court of Appeals, District of Columbia. Filed Sept. 4, 1924. Henry W. Hodges, clerk.

○

18

In Court of Appeals of District of Columbia

Argument of cause

January 7, 1925

NO. 4207 UNITED STATES OF AMERICA, APPELLANT, VS. THE EQUITABLE TRUST COMPANY OF NEW YORK, A CORPORATION

NO. 4208 THOMAS WOODNUTT MILLER, ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, TREASURER OF THE UNITED STATES, APPELLANTS, VS. THE EQUITABLE TRUST COMPANY OF NEW YORK, A CORPORATION

The argument in the above-entitled causes was commenced by Mr. Dean H. Stanley, attorney for the appellants, and was concluded by Mr. F. D. McKenney, attorney for the appellee. On motion the appellants are allowed to file a reply brief herein.

19

In Court of Appeals of District of Columbia

[Title omitted.]

20

Mr. Justice VAN ORSDER delivered the opinion of the court:

These cases are here on appeal from final decrees of the Supreme Court of the District of Columbia against appellants White, as Treasurer of the United States, and Miller, as Alien Property Custodian, defendants below, in which White, as Treasurer, is required, in cases numbered 4202, 4204, 4206, 4208, 4217, 4219, 4221, 4223, 4225, 4227, and 4229, to pay to the plaintiff in each case certain sums of money out of funds in the Treasury of the United States seized and held by him as property of the Imperial German Government.

These suits were brought in the Supreme Court of the District of Columbia by the holders of certain notes against the Imperial German Government, issued and sold by Germany prior to the entrance of the United States into the war. The notes were payable in American currency on April 1, 1917, five days prior to the declaration of war between the United States and Germany. Upon payment of interest in advance the maturity of the notes was extended to April 1, 1918.

Concededly the notes sued on constituted a debt within the meaning of the provisions of sec. 9 of the trading with the enemy act as amended, 42 Stats. 1511. It is averred in the bills of the respective plaintiffs that the Alien Property Custodian now has in his possession or to his credit in the Treasury of the United States, funds of the Imperial German Government which were paid and delivered to him under the provisions of the trading with the enemy act, and which are available by law and sufficient in quantity to pay plaintiffs' claims both principal and interest.

Defendants, Miller and White, filed motions to dismiss the bills of complaint upon the grounds that the Imperial German Government, or its successor, is a necessary party to the suits, and that pursuant to the terms and provisions of the trading with the enemy

act and the treaties between the United States and Germany, the United States is the owner of the moneys which plaintiffs seek in these suits to subject to the payment of their claims. The motions to dismiss were overruled and defendants answered admitting the citizenship and residence of the plaintiffs; that plaintiffs are "persons" within the meaning of sec. 9 of the trading with the enemy act, and that the Imperial German Government is an enemy within the meaning of the act. But as to other allegations in the bills, strict proof was demanded.

After answers were filed by defendants White and Miller, the Attorney General filed in each case a suggestion as to certain
21 rights of the United States, asserting in substance that the German Government, as a result of the war, is heavily indebted to the United States; that if the plaintiffs herein, and certain other claimants enumerated, are permitted to satisfy their claims against the fund now held in the Treasury of the United States to the account of the German Government, the said fund would be exhausted and there would be nothing from which the United States and other creditors could secure the payment of their claims, and that such a course would lead to an inequitable preference of creditors. It is then prayed on behalf of the United States that the bills be dismissed; that the claim of the United States be declared a valid and existing indebtedness which the Treasurer should be ordered to pay out of the fund aforesaid; that the court award the United States priority over other claims, or that it be entitled to share pro rata with other claimants in the distribution of the fund; that the court take jurisdiction of the claim of the United States against the Imperial German Government, and that the court order the claim of the United States paid out of said fund.

The plaintiffs filed motions to strike out the suggestion upon the grounds, among others, that the suggestion put in issue matters existing between the German Government and the United States, neither of which are proper parties to these suits; that the United States is not authorized to file such notice of claims under sec. 9 of the trading with the enemy act; that the court is without jurisdiction to determine the right of the United States in respect of the claims set up against the Imperial German Government, and that it appears on the face of the suggestion that the claims asserted have been settled between the United States and Germany by treaty, and are, therefore, not matters within the jurisdiction of the court, but are matters for diplomatic intercourse and settlement between the respective sovereigns.

The court sustained the motions to strike, from which the United States has appealed in cases numbered 4201, 4203, 4205, 4207, 4216, 4218, 4220, 4222, 4224, 4226, and 4228.

The cases were heard on bill and answer, and certain evidence adduced establishing that there was on June 13, 1924, to the account of the Imperial German Government in the Treasury of the United States \$2,715,571, more than sufficient to satisfy the plaintiffs' claims. This sum was accounted for by record entries of the Treasury Department showing a fund of \$515,571, deposited by the Alien Property Custodian with the Treasurer, in Trust No. 555-Special, "Imperial German Government"; and the sum of \$2,200,000, transferred by order of the Custodian, March 9, 1923, from Trust No. 9322.

"Undisclosed enemy No. 1," to Trust No. 555-Special, "Imperial German Government."

Three propositions are involved in these appeals:

First, is the Imperial German Government a necessary party to these suits?

Second, is the evidence adduced sufficient to establish the existence in the Treasury of the United States of a fund belonging to the Imperial German Government against which these claims may be asserted?

Third, has the United States the right to set up its claim against Germany as a defense in these suits, in order that it may lay claim to the funds in the Treasury which had been seized as funds of the Imperial German Government?

We come now to the consideration of the necessity of making the German Nationals, successor of the Imperial German Government, a party defendant in the present cases. The seizure of any enemy's property is justified as an act of war. Two courses were open to the United States, in respect of property belonging to an enemy or ally of enemy, either to seize the property and conserve it for future disposition, or to confiscate it. *Miller v. United States*, 11 Wall. 268. In either case the action of the Government would be sustained. Indeed the property of any enemy or ally of enemy, seized under the trading with the enemy act, so far as its return is concerned, is in a state of confiscation, since Congress specifically reserved to itself its future disposition. The property here in question, concededly enemy property, would be, but for sec. 9, the property of the United States, subject to whatever disposition Congress might deem proper. The seizure of the funds in question divested the German Government of all title or interest therein, and their subsequent disposition is a matter with which it is not concerned. *Munich Reinsurance Co. v. First Reinsurance Co. of Hartford*, 300 Fed. 345.

Section 9 of the trading with the enemy act is a remedial measure, affording the method by which property wrongfully seized may be restored to its proper owner; or by which debts "owing from an enemy or ally of enemy" may be recovered out of the property seized. To this extent, the United States has relinquished all claims it might otherwise have asserted under confiscation. Recovery under the act may be had either through executive allowance or by decree of a court. In all proceedings, however, against the funds so seized and held, the Alien Property Custodian or the Treasurer of the United States, or both, are made by the statute the proper defendants. The Alien Property Custodian stands in the relation of a common law trustee. His appearance as defendant furnishes all the protection to which the parties are entitled.

The silence of the trading with the enemy act, as to the right or necessity of an enemy or ally of enemy to be made a party defendant, is significant. The act in sec. 2, among other things, defines the term "enemy" as follows: "The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act . . . (b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof." The act further defines the meaning of the term "person" and the

meaning and significance of the words "United States." The German Government, therefore, was an enemy of the United States, within the terms of the trading with the enemy act.

The object of sec. 9 was to give a speedy and efficient remedy to nonenemy persons against losses and inconvenience liable to result from the strict enforcement of the act. To have required the joinder of the enemy-owner, as a party defendant in each instance, would have amounted to a denial of remedy to nonenemy creditors. This situation was well known and manifest to Congress. It may well be that an enemy-owner, for example the German Government in the present cases, could, upon request, be made a party defendant. *McVeigh v. United States*, 11 Wall. 259. But this could only be done at the request of the sovereign itself. No power resides in Congress or in the courts to require the sovereignty of Germany to become a party defendant in any action. This could only occur through the act of the sovereign itself.

It follows, therefore, that inasmuch as the German Government can not be brought into court, except at its own election, the court would be without jurisdiction of these cases, and the act would be a mere nullity. It is elementary that debts due from a friendly nation can not be enforced in the courts of the creditor nation.

In proper sequence the contention that the United States is a proper party to these suits may next be considered. This is urged substantially upon two grounds: First, that the United States may enforce a prior claim against this money in the hands of the defendants in order to protect itself against losses sustained during the war. Second, that the fund should be held by the defendants to satisfy claims arising under the provisions of the treaty of peace made between Germany and the United States on August 25, 1921, which embraces all persons, citizens of the United States, who suffered damages and injuries to person or property at the hands of the Imperial German Government.

Again, the silence of the trading with the enemy act, as to the necessity of the United States being made a party to suits brought under sec. 9, and the specific designation of the Alien Property Custodian or the Treasurer or both as defendants, is significant. It is nowhere provided in the act that enemy funds in the possession of the defendants may be subjected to the payment of claims due the United States. Nor do we think that the United States is a "person," as mentioned in sec. 9 of the act, or such a party as can take advantage of the provisions thereof. It may be suggested that if, as contended, the United States can assert a claim in the courts against this fund, the action should be brought by the United States directly, it can not be asserted through intervention by way of suggestion, or by motion to dismiss in the present cases. In other words, the United States has no such interest in the fund here in question as can be affected by the present suits. The fund has been set aside by the act for the satisfaction of such claims as may be legally brought against it by claimants other than the United States. The United States has relinquished any interest it may have had in the fund in favor of creditors of the enemy, in this instance the German Government. The claims here asserted, are, therefore, not against the United States. "While the suit, as held in *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591, 603 (affirming 289 Fed. 924),

is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff." *Miller v. Robertson*, 000 U. S. 000. (October Term, 1924.) In other words, the rule of sovereign immunity from liability does not apply.

The contention that in addition to plaintiffs' claims there are outstanding claims being asserted against the fund in question, which in the aggregate amount to \$3,257,945, or more than the amount of the fund now in the Treasury, is of no importance. Section 9 (a), as amended, provides, among other things, as follows: "If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated."

It is clear from the terms of the act that a suit brought under it is not in the nature of a creditor's bill calling for a marshalling of claims, nor does it give any preference to one creditor over another, or call for a sharing pro rata with other creditors in the funds against which the claims are made. This court has no jurisdiction over the outstanding judgments, nor is it concerned with the ability of the fund in the Treasury to meet the various claims against it. The contentions of the Government in these particulars might have been provided for by Congress, but they were not, and the court must apply the law as it finds it.

Coming now to the question of the sufficiency of the evidence aduced by plaintiffs to sustain the judgments of the court in the respective cases, there appears in paragraph 8 of the bill of complaint the following allegation: "That the Alien Property Custodian now has in his possession or to his credit in the Treasury of the United States funds of the Imperial German Government, which were paid and delivered to him under the provisions of said trading with the enemy act, as amended, and which are available by law, sufficient to pay the entire indebtedness, both principal and past due interest owing to complainant."

The defendants, answering this paragraph, alleged that they had no knowledge or information sufficient to form a belief with respect to the averments of paragraph 8 of the bill of complaint, and, therefore, demand strict proof thereof. In support of this averment of the plaintiffs, the answer filed by the defendants *Miller and White* in the case of the *Mechanics Securities Corporation v. Frank White*, as Treasurer of the United States, and *Thomas W. Miller*, as Alien Property Custodian, then pending in the Supreme Court of the District of Columbia, and submitted on this appeal as No. 4195, was offered and received in evidence over objection and exception by defendants. The answer in that case, made under oath by the de-

23 defendants, set forth that the custodian had turned over to the Treasurer \$515,571, which was deposited in Trust No. 555-Special, "Imperial German Government"; and that there had been transferred to the same trust \$2,200,000 from Trust No. 9322,

"Unknown enemy No. 1," making a total credit to Trust No. 555-Special, "Imperial German Government," of \$2,715,571. The status of these respective trusts was also shown by true copies of record entries from the Treasury Department, which were put in evidence.

This was unquestionably competent evidence and sufficient in character to establish a *prima facie* case as to the existence of funds seized from the Imperial German Government, and held in the Treasury against which the claims of plaintiffs could be asserted. As was said in *Pope v. Allis*, 115 U. S. 363, 370: "When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated. *Studdy v. Sanders*, 2 D. & R. 347; *De Whelpdale v. Milburn*, 5 Price 485; *Central Bridge v. Lowell*, 15 Gray 106; *Bliss v. Nichols*, 12 Allen 443; *Elliott v. Hayden*, 104 Mass. 180; *Cook v. Barr*, 44 N. Y. 156; *Taylor on Evidence*, sec. 1753, 7th ed.; *Greenleaf Evidence*, secs. 552, 555."

The truth of these statements is not controverted. The only attempt made by defendants to rebut this testimony was the offer of a copy of a letter, dated March 14, 1924, from the Alien Property Custodian to the Secretary of the Treasury, attempting to withdraw the instruction sent to the Secretary of the Treasury, under date of March 10, 1923, directing the transfer of the \$2,200,000 from Trust No. 9322 to Trust No. 555-Special, "Imperial German Government." The court sustained the objection of plaintiffs to the admission of this letter in evidence, to which ruling defendants excepted. It is contended by plaintiffs that it was beyond the power of the custodian to thus shift the fund during the pendency of these suits. Counsel for defendants on the contrary state in their brief that "the plaintiff in the cause must rely as to the two million two hundred thousand dollars above upon the instructions given by the custodian after the money had been seized as belonging to an unknown enemy. If the custodian had authority to change the ownership of the money at the time referred to in the original answer, he had just as much authority to change it and order it held to the credit of the unknown enemy again."

We are not impressed by this contention. The transfer of the \$2,200,000 to Trust No. 555-Special, "Imperial German Government," on March 8, 1923, was a determination by the custodian of the enemy ownership of the fund. It amounted to a finding after investigation, that the fund should be held "for, by, on account of, or on behalf of, or for the benefit of" the Imperial German Government. There was no change of the ownership by the custodian when the fund was transferred on March 8, 1923, since there is nothing in the record to indicate that the ownership up to that date had been specifically determined. The custodian, then exercising the power imposed upon the President, determined specifically the enemy ownership of this fund. In further support of the lack of evidential effect of the letter of March 14, 1924, it contains no reasons, nor is it supported by any evidence, which challenges or affects the correctness of the former determination of enemy ownership.

It was not within the power of the custodian to defeat the present actions, during their pendency in the court below, by his attempted transfer of the fund back to "unknown enemy Trust No. 9322." In

case of suit, the statute itself provides for the retention of the money or property in the custody of the Alien Property Custodian or the Treasurer of the United States, to await the final judgment or decree. It is clear, therefore, that the custodian having determined the question of enemy ownership, and having designated the fund in the Treasury to which it belonged, could not, without at least good and sufficient reasons, by the mere transfer of this fund, so change the status of the property in litigation, as to destroy claimant's cause of action while suit was pending.

In the appeals against the Equitable Trust Company of New York, Numbers 4207 and 4208, counsel for appellee company challenge the right of the United States to prosecute an appeal in these cases under sec. 226 of the Code of the District of Columbia providing that "any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District" may appeal to this court. The objection is based upon the ground that the United States "was not a party in any sense or aspect of the case in the court below, and it never at any time sought to have itself made a party by intervention or otherwise." Consequently there is no final order or decree from which it may appeal. We think this objection to the right of appeal by the United States must be sustained. No petition was filed in the court below by the United States for right to intervene, nor can the suggestion filed be treated as a petition for intervention. The order striking the suggestion from the files was a mere interlocutory order, which could not furnish the basis for a separate appeal. The attempt here made by the United States is to conduct separate appeals, and thereby avoid any connection with the original cases.

The lack of necessity for intervention by the United States is apparent. The Alien Property Custodian and the Treasurer are made defendants by the express terms of the act, and as such have power to defend the interests of the United States. This they have attempted to do in the original cases by motion to dismiss for lack of proper parties. In support of this motion they could have advanced all the reasons for making the United States a party defendant, that have been suggested in the paper sought to be filed in the court below. The appeals of the United States in these cases will be dismissed.

Counsel have likewise challenged the right of appeal to this court by the Alien Property Custodian and the Treasurer, on the ground that the trading with the enemy act is a special statute and in the absence of specific provision for appeal, appeal can not be prosecuted under sec. 226 of the District Code. The act provides specifically for appeals in cases arising under it from the district courts of the United States to the Circuit Courts of Appeals, but makes no provision specifically for an appeal to this court from the judgment or decree in a suit instituted in the Supreme Court of the District of Columbia.

Without stopping to review this contention at length, we are of opinion that it was the intention of Congress that a right of appeal should be retained in all cases brought under the act, and inasmuch as many of these cases have been appealed and considered by this court, and a number of them on further appeal considered by the Supreme Court of the United States, without this objection having

been heretofore interposed, we will refuse now to interrupt this course of procedure. We hold, therefore, that the right of appeal in these cases is within the provisions of sec. 226 of the District Code.

In the aforesaid cases in which the United States is appellant, the appeals are dismissed. In the cases in which Frank White, Treasurer of the United States, and Thomas W. Miller, Alien Property Custodian, are appellants, the decrees are affirmed with costs.

25 In Court of Appeals of District of Columbia

[Title omitted.]

Judgment

March 2, 1925

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDER.

MARCH 2, 1925.

Judge JAMES F. SMITH of the U. S. Court of Customs Appeals sat in this case in the place of Mr. Chief Justice MARTIN.

26 In Court of Appeals of District of Columbia

[Title omitted.]

Petition for appeal

Filed May 2, 1925

Now come your petitioners, Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, appellants in the above-entitled cause, and show unto the court that on the 2nd day of March, 1925, a decision was rendered and a decree entered against them herein, in which decision and decree, to their damage and prejudice, certain errors were committed, as will appear from the assignment of errors filed herewith.

Your petitioners further show that the decree of the Court
27 of Appeals herein is subject to review by the Supreme Court under the provisions of paragraphs first, fifth, and sixth of section 250 of the Judicial Code in that the jurisdiction of the trial Court is in issue; that this case is one in which the existence and scope of the power and duty of an officer of the United States, to wit, the Alien Property Custodian, is drawn in question; and that this is a case in which a construction of a law of the United States is drawn in question by the defendants, to wit, the construction of the trading with the enemy act, as amended.

Wherefore your petitioners pray the allowance of an appeal to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court, and it appearing that this appeal is brought up by direction of a department of the Government, namely, the Department of Justice, that no bond, obligation or security be required from your petitioners to answer in damages or costs, and that the said appeal shall operate as a supersedeas.

THOMAS W. MILLER,
As Alien Property Custodian.
FRANK WHITE,
As Treasurer of the United States.
By PEYTON GORDON,
Attorney of the United States in and for the
District of Columbia, Their Attorney.

28 Service of a copy of the above petition for appeal received this 1st day of May, 1925.

McKENNEY & FLANNERY,
Attorneys for Appellees.

29 IN COURT OF APPEALS OF DISTRICT OF COLUMBIA

[Title omitted.]

Assignment of errors

Filed May 2, 1925

And now come Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, the appellants herein, and say that in the record and proceedings of the Court of Appeals in the above-entitled cause and in the rendition of the final decree therein, manifest error has intervened, to the prejudice of said appellant in this, to wit:

(1) The court erred in ordering, adjudging and decreeing that the final decree entered in this case in the Supreme Court of the District of Columbia on the 19th day of June, 1924, be affirmed.

(2) The court erred in not ordering, adjudging and decreeing that the final decree entered in the case in the Supreme Court of the District of Columbia on the 19th day of June, 1924, be reversed.

30 (3) The court erred in deciding and adjudging that the Imperial German Government was not a necessary party defendant to the suit.

(4) The court erred in not deciding and adjudging that the Imperial German Government was a necessary party to the suit.

(5) The court erred in adjudging and deciding that the Supreme Court of the District of Columbia had jurisdiction of the subject matter of the suit.

(6) The court erred in not adjudging and deciding that the Supreme Court of the District of Columbia was without jurisdiction of the subject matter of the suit.

(7) The court erred in deciding and adjudging that it is clear from the terms of the trading with the enemy act that a suit brought

under it is not in the nature of a creditor's bill calling for a marshalling of claimants, nor does it give any preference to one creditor over another, or call for a sharing prorata with other creditors in the funds to which the claims are made.

(8) The court erred in deciding and adjudging that there was competent evidence and sufficient in character to establish a prima facie case as to the existence of funds seized from the Imperial German Government and held in the Treasury of the United States against which the claims of the plaintiffs could be asserted.

31 (9) The court erred in deciding and adjudging that the transfer of the \$2,200,000 to Trust No. 555-Special "Imperial German Government," on March 8, 1923, was a determination by the Alien Property Custodian of the enemy ownership of the fund.

(10) The court erred in deciding and adjudging that the transfer of the \$2,200,000 to Trust No. 555-Special, "Imperial German Government," on March 8, 1923, amounted to a finding, after investigation, that the fund should be held "for, by, on account of and on behalf of, or for the benefit of the Imperial German Government."

(11) The court erred in deciding and adjudging that there was nothing in the record to indicate that the ownership of the fund in question up to March 8, 1923, had been specifically determined.

(12) The court erred in not adjudging, ordering, and decreeing that the decree of the Supreme Court of the District of Columbia entered in the case on the 19th of June, 1924, be reversed and the cause remanded to that court with instructions that the bill of complaint be dismissed.

All of which is respectfully submitted.

THOMAS W. MILLER,
Alien Property Custodian.

FRANK WHITE,
Treasurer of the United States.

By PEYTON GORDON,
*Attorney of the United States in and for
the District of Columbia, Their Attorney.*

Service acknowledged this 1st day of May, 1925.

McKENNEY & FLANNERY,
Attorneys for Appellees.

[File indorsement omitted.]

32 In Court of Appeals of District of Columbia

[Title omitted.]

Order allowing appeal

May 4, 1925

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above-entitled

cause it is ordered by the court that said appeal be, and the same is hereby, allowed as prayed, the same to operate as a super-sedeas.

33 [Citation in usual form showing service on McKenney & Flannery, filed May 4, 1925, omitted in printing.]

34 In Court of Appeals of District of Columbia

[Title omitted.]

Præcipe for transcript of record

Filed May 2, 1925

The clerk will please prepare a transcript of record on appeal to the Supreme Court of the United States in the above-entitled cause and include therein the following:

The printed record in the Court of Appeals.

Minute entry as to argument of case.

The opinion.

The decree.

Petition for the allowance of appeal and assignment of errors.

Order allowing appeal.

Citation.

This designation.

THOMAS W. MILLER,
Alien Property Custodian.

FRANK WHITE,
Treasurer of the United States.

By PEYTON GORDON,
*Attorney of the United States in and for
the District of Columbia, Their Attorney.*

Service acknowledged 1st day of May, 1925.

McKENNEY & FLANNERY,
Attorney for Appellee.

[File indorsement omitted.]

35 In Court of Appeals of District of Columbia

Clerk's certificate

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 34, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Thomas Woodnutt Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, appellants, vs. The Equitable Trust Company of New York, a corporation, No. 4208, April term, 1925, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals at the city of Washington, this 5th day of May, A. D. 1925.

[SEAL.]

HENRY W. HODGES,

Clerk of the Court of Appeals of the District of Columbia.

[Indorsement on cover:] File No. 31138. District of Columbia Court of Appeals. Term No. 431. Frederick C. Hicks, Alien Property Custodian, and Frank White, Treasurer of the United States, appellants, vs. The Equitable Trust Company of New York. Filed May 8th, 1925. File No. 31138.

